

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board, the parties agreed May 2, 2003, should be used as the date of accident for computing any disability benefits arising from the alleged period of injury.

**ISSUES**

This is a claim for a low back injury that claimant allegedly sustained over a several-week period from March 19, 2003, through May 2, 2003. In the December 27, 2006, Award, Judge Hursh determined the date of accident for computation purposes for the alleged period of injury was May 2, 2003, the last day claimant worked for respondent. Moreover, the Judge concluded claimant failed to prove she injured her back working for respondent. Consequently, the Judge denied claimant's request for compensation. The Judge did not address respondent and Hartford's request for costs, fees, and expenses.

Claimant contends Judge Hursh erred. Claimant requests the Board to: (1) find that she injured her back between March 19, 2003, and May 2, 2003, as the result of an accident that arose out of and in the course of her employment with respondent; (2) find she sustained a 10 percent whole person impairment and, more importantly, find that she is now permanently and totally disabled as the result of her work injury; (3) order payment of past and future medical and hospital expenses and temporary total disability benefits for the period from May 5, 2003, through August 1, 2005; and (4) deny Hartford's request for costs, fees and expenses as she could not unilaterally agree to dismiss Hartford and, moreover, the date of accident could be changed by the fact-finder.

Respondent and both Liberty Mutual and Hartford request the Board to affirm the Award. In addition, respondent and Hartford request the Board to dismiss the claims against them and award them costs, fees and expenses under K.S.A. 44-536a. In the alternative, respondent and Hartford requested the Board to remand this proceeding to the Judge to address their request for costs, fees and expenses. They contend there was no basis to assess liability against Hartford as its coverage period ended before the period of accident in question and, therefore, claimant should have agreed to dismiss Hartford from this claim.

The issues before the Board on this appeal are:

1. Did claimant prove she injured her back working for respondent?
2. If so, what is the nature and extent of her injury and disability?
3. Is claimant entitled to receive temporary total disability benefits for the period from May 5, 2003, through August 1, 2005?
4. Are respondent and Hartford entitled to receive costs, fees and expenses from claimant under K.S.A. 44-536a?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant requests workers compensation benefits for an injury to her back that allegedly occurred at work between March 19, 2003, and May 2, 2003, which was her last day working for respondent. As noted by Judge Hursh, claimant's job entering printing orders into a computer and printing instructions was predominantly sedentary and required little physical exertion. Consequently, the Judge found claimant did not injure her back working for respondent during the period in question. In essence, the Judge determined the increased low back symptoms that claimant experienced during the period from March 19, 2003, through May 2, 2003, were directly linked to a failed two-level spinal fusion that was performed in November 2002 rather than to a new low back injury.

The majority of the Board agrees and affirms that holding.

Respondent is a printing company. Claimant began working for respondent in 1995 and eventually obtained the job of entering orders in a computer. That job required claimant to spend approximately seven hours of her eight-hour workday sitting in front of her computer. For the majority of any given hour, claimant would be seated but she would stand once or twice, sometimes more, depending upon the need to go to a copy machine or a machine that made negatives. In short, claimant's job required prolonged sitting but there was flexibility in her being able to stand.<sup>1</sup>

Claimant has experienced low back problems since she was very young. And she has experienced ongoing back pain for several years now that would sometimes spike. In 2001, claimant experienced such a spike that did not resolve and eventually led to a two-level spinal fusion with instruments. That surgery was performed in November 2002.

But this claim is about the symptoms that claimant experienced when she returned to work for respondent following the November 2002 low back surgery. According to claimant and her back surgeon, Dr. Frank Tomecek, in March 2003 claimant was recovering from her back surgery when she felt she could resume working. Although Dr. Tomecek initially released claimant to return to work on a part-time trial basis, he amended his release to permit full-time work after being advised respondent would not permit claimant to work part-time. The doctor indicated, however, that claimant should be permitted for her comfort to alternate sitting and standing as necessary.

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<sup>1</sup> Garrison Depo. (Oct. 2, 2003) at 22-25.

Claimant resumed her regular job duties on March 19, 2003, although she was still taking Oxycontin for pain and a muscle relaxant. As the days progressed, so did her back pain. Consequently, on May 2, 2003, claimant left work early when she reached the point of being unable to tolerate her severe back pain. On May 5, 2003, claimant returned to Dr. Tomecek, who immediately restricted her from working.

Despite leaving work, claimant's symptoms did not improve. Consequently, Dr. Tomecek had claimant undergo a myelogram CAT scan, which showed claimant's fusion was not yet solid. Thinking the fusion might still heal, the doctor did not immediately rush to surgery. But when claimant's symptoms did not improve, Dr. Tomecek operated on claimant's back in November 2003 to remove the instruments used in the November 2002 procedure. The doctor then discovered that claimant's fusion was not solid at either level. In the November 2003 surgery, the doctor removed the old hardware and installed expandable screws as claimant's had eroded somewhat in the bone, which had made them loose. Dr. Tomecek also revised the two-level fusion with more bone and installed a bone stimulator.

Claimant continued to see Dr. Tomecek after her November 2003 back surgery. Because of increased symptoms, the doctor requested another myelogram in 2004, which showed claimant had less severe spondylolisthesis. In addition, the fusion looked solid at L4-5 but less certain at L5-S1. After recommending that they should consider removing the hardware, explore the fusion and perhaps redo the fusion from the front, the doctor has not seen claimant since August 2005. In short, Dr. Tomecek does not know whether or not claimant's lower fusion is solid or whether or not her present pain is being caused by the hardware used in the November 2003 operation. In any event, the doctor does not believe claimant was able to work the last time he saw her.

The principal issue in this claim is whether the work that claimant performed for respondent between March 19, 2003, and May 2, 2003, either aggravated or injured claimant's back, which would entitle her to receive workers compensation benefits. The record contains the expert opinions from three doctors on that issue.

As indicated above, Dr. Tomecek, who is a board-certified neurosurgeon, performed the two-level discectomy and fusion on claimant's low back in November 2002 after finding claimant had mild spondylolisthesis at L5-S1 and degenerative disk changes at L4-5 and L5-S1. When the doctor released claimant to work in March 2003, he believed part-time work was appropriate as claimant had weakened back muscles both from her surgery and from wearing a back brace and that sitting up straight for eight hours with those weakened muscles would cause her to have a lot of discomfort and pain.<sup>2</sup> Dr. Tomecek also testified:

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<sup>2</sup> Tomecek Depo. at 12.

The back, the stronger your back muscles are basically and the stronger your abdominal muscles are, those two areas basically, the more support you have to your spine so certainly the things guarding the spine to help this whole process of healing along are a combination of the hardware that we put in, the abdominal muscles, and the back muscles, and the ligaments help to support the spine while this bone is healing and fusing.<sup>3</sup>

Moreover, Dr. Tomecek believes the prolonged sitting claimant did upon her return to work in March 2003 prevented the two-level fusion from healing. The doctor, however, in reaching that conclusion presumed claimant sat in a captive position and that she had little opportunity either to change positions or to get out of her chair. In summary, Dr. Tomecek believes that sitting upright for a prolonged period puts weight-bearing stress on the low back that can cause either a fusion to fail or the hardware used in that fusion to loosen.

[O]bviously, when you sit upright you put more stress on the low back because the low back then bears all the weight of the upper body. . . . [S]o sitting certainly puts your back under -- under stress, under weight-bearing stress and prolonged weight bearing in -- in a patient who hasn't healed can cause the . . . procedure to fail or the hardware to loosen. . . .<sup>4</sup>

Finally, Dr. Tomecek believes claimant would have sustained additional impairment as measured under the AMA *Guides*<sup>5</sup> (4th ed.) due to her November 2003 surgery.

Claimant's attorney hired Dr. Edward J. Prostic to evaluate claimant for purposes of this proceeding. According to Dr. Prostic, who examined claimant both before and after the November 2003 surgery, claimant aggravated her low back when she returned to work in March 2003. Dr. Prostic agreed with Dr. Tomecek that the work claimant performed from March through early May 2003 caused her fusion to fail. The doctor testified, in part:

What the patient described to me was that she was having uneventful healing until she returned to work and then she had worsening of back symptoms. You have to presume that she was on her way to uneventful healing of the arthrodesis at both levels until activities at work caused enough motion at the segment that it didn't heal completely. It's either that or it's just a failure of hardware and when I saw her there was no broken hardware, there was no obvious evidence of loosening of hardware.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 39.

<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

For some reason the work activities appeared to have stopped the process of healing at L5-S1.<sup>6</sup>

Based on his September 2005 examination of claimant, Dr. Prostic thought claimant had a solid fusion at the upper level but not at L5-S1. Nonetheless, the doctor concluded claimant would more likely benefit from psychological treatment instead of additional surgery. Like Dr. Tomecek, Dr. Prostic also concluded claimant was unable to work when he last examined her in September 2005. In addition, Dr. Prostic concluded claimant had sustained an additional 10 percent whole person impairment due to the November 2003 surgery as measured by the *AMA Guides* (4th ed.). And finally, Dr. Prostic indicated claimant sustained a 42 percent task loss (lost eight of 19 tasks) after reviewing the list of former work tasks prepared by Karen Crist Terrill.

To counter the opinions of Dr. Tomecek and Dr. Prostic, respondent and its insurance carrier hired board-certified neurosurgeon Dr. Paul S. Stein to examine and evaluate claimant. According to Dr. Stein, claimant's return to work in March 2003 may have caused back discomfort but her work did not cause the November 2002 fusion to fail. In addition, Dr. Stein testified that claimant's whole person functional impairment from the November 2002 surgery was 20 percent, which did not increase due to the November 2003 surgery. According to Dr. Stein, under the best circumstances there is a certain failure rate for fusions.

The Board is not persuaded claimant's work activities in March through early May 2003 either aggravated or further injured her low back. As noted by the Judge, claimant's work was very light and she could stand and move around as necessary. Claimant's work did not place her in a captive position.

We now turn to the request of respondent and Hartford to assess their costs, fees and expenses against claimant. This was an issue that was not raised when the Judge took stipulations and designated the issues at the regular hearing. Moreover, counsel for respondent and Hartford did not raise the issue of costs, fees, and expenses when given the opportunity. After the Judge noted there were issues regarding accidental injury, notice, written claim, temporary total, medical, and the nature and extent of disability, the following colloquy took place:

The Court: Okay. And the final issue for me would be nature and extent of disability. I understand you are treating this as a work disability, Mr. Phalen?

Mr. Phalen: Yes, sir.

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<sup>6</sup> Prostic Depo. at 22.

The Court: Have I left anything out?

Mr. Streit [attorney for respondent and Liberty Mutual]: I don't think so, Judge.

Mr. Dumm [attorney for respondent and Hartford]: No, Judge.<sup>7</sup>

It appears respondent and Hartford raised the issue of their costs, fees, and expenses in their December 20, 2006, submission letter to Judge Hursh. In the December 27, 2006, Award, the Judge did not designate the request for costs, fees and expenses of respondent and Hartford as an issue to be determined. And, as indicated above, the Judge did not address that request in the Award.

At oral argument to the Board, when addressing the request for costs, fees and expenses both claimant's counsel and counsel for respondent and Hartford premised their arguments on alleged facts that are not in the record. That is understandable as the issue was not raised until after the terminal dates for submitting evidence had expired. Claimant's terminal date was November 17, 2006, and the terminal date for respondent and its insurance carriers was December 17, 2006.

Respondent and Hartford contend they should receive their costs, fees and expenses as provided by K.S.A. 44-536a. That request, however, was raised rather belatedly. Moreover, the statute provides that sanctions may be ordered only after proper notice and an opportunity to be heard. In this instance, the request for sanctions was made after the record was closed and, therefore, the parties did not have an opportunity to present any pertinent evidence on that issue. Accordingly, the Board finds this issue should be remanded to the Judge to address whether the request for sanctions was properly raised and, if so, to provide the parties an opportunity to be heard and present their evidence and argument.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>8</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>7</sup> R.H. Trans. at 5, 6.

<sup>8</sup> K.S.A. 2006 Supp. 44-555c(k).

**AWARD**

**WHEREFORE**, the Board affirms the December 27, 2006, Award in part, and remands this proceeding to Judge Hursh to address the request of respondent and Hartford for costs, fees and expenses, as indicated above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2007.

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BOARD MEMBER

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**DISSENT**

We respectfully disagree with the majority's finding that claimant failed to prove she either injured or aggravated her back working for respondent from March through early May 2003. The greater weight of the medical evidence establishes that the prolonged sitting at work prevented claimant's fusion from healing. There is no question that Dr. Tomecek found the screws he installed in claimant's spine in the November 2002 procedure had loosened. Likewise, the greater weight of the evidence establishes that claimant's work exacerbated her low back symptoms. Accordingly, we believe the evidence establishes that claimant, at a minimum, aggravated her back when she returned to work in March 2003.

We feel the real issue in this claim is determining the nature and extent of claimant's disability. In this regard, we have a worker who returns to work while recovering from a two-level fusion that has not solidified, who then experiences increased symptoms due to the prolonged sitting associated with her job, and who then leaves work due to those symptoms and discovers that her fusion did not heal. It is arguable that claimant returned

to work in March 2003 with a non-healed fusion and left work in early May 2003 in a similar state. And further complicating the analysis is that Dr. Tomecek believed claimant would experience increased pain from sitting as merely a natural consequence of her November 2002 fusion and the resulting weakened back muscles. However, the expert medical opinions of Dr. Tomecek and Dr. Prostic prove that it is more probably true than not true that claimant aggravated and made her condition permanently worse by returning to work.

In short, the evidence establishes an aggravation of claimant's back condition, which would at the minimum entitle claimant to appropriate medical benefits.

Finally, the undersigned would deny the request of respondent and Hartford for costs, fees and expenses as that issue was not addressed by the Judge. But the undersigned otherwise agree with the majority that the issue should be remanded to the Judge for further proceedings, including a determination by the Judge of whether that issue had been raised by respondent before the record was closed.

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Anemarie D. Mura, Attorney for Respondent and Hartford  
Janell Jenkins Foster, Attorney for Respondent and Liberty Mutual  
Kenneth J. Hursh, Administrative Law Judge